

THE DUAL STATUS OF THE NATIONAL GUARD AND THE TOTAL FORCE

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INTRODUCTION

The National Guard and Reserves are organized and funded to supplement active forces when needed.¹ In peacetime, however, National Guard units belong to states, and state governors are the commanders in chief. Unless federalized, Guard members are not subject to the Uniform Code of Military Justice, and Guard units fall outside of the formal Department of Defense (DOD) command structure. Under the law, the National Guard is composed of individual, but nationally funded and regulated state militias that can be federalized and used as a reserve force. The Reserves are always federal and are subject to direct DOD control. A unified command that includes the Guard, the Reserves, and the active component is attainable by federalizing the Guard. Statutory tools are available to activate all or part of the Guard (and Reserves) to meet DOD requirements.² Guard units may also be federalized 15 days each year for training or federal missions, and Guard members, with their governor's consent, may volunteer for federal service.³

In 1947 a board appointed by Secretary of Defense James Forrestal recommended permanently federalizing the National Guard by making it part of the Reserves.⁴ The National Guard Association, a lobbying group representing Guard interests, appealed to Congress, and Secretary Forrestal's recommendation was rejected.⁵ In 1964 Secretary of Defense Robert McNamara recommended streamlining the Guard and Reserves by merging the Reserves into the Guard.⁶ The Reserve Officer's Association intervened (170 members of Congress were Reserve Officer's Association members), and Congress again rejected the DOD's reserve component reorganization plan.⁷ Regardless of

Congressional support, the DOD remained skeptical of the Guard and Reserves' utility, and funds were concentrated on the active component.

Secretary of Defense Melvin Laird coined the phrase "Total Force" in a memorandum issued on August 21, 1971.⁸ Secretary Laird was reacting to declining budgets and believed that placing more emphasis on the National Guard and Reserves as part of a "Total Force" was the most feasible way to achieve national defense objectives with limited funding. Over the next thirty years, poorly equipped and inadequately trained National Guard and Reserve units were transformed and are now critical to the success of any military mission. The United States cannot go to war without the Guard and Reserves.

The challenge of maintaining a Total Force requires periodic examination of the statutory scheme that governs the Guard and Reserves. This paper will review the historic background that led to the current law that places the National Guard under control of the states as well as the impact of the National Guard's legal status on the Total Force. The paper will offer three options. The first option is to eliminate the Guard's state status by merging it into the Reserves. The second option is to maintain the status quo, continuing the National Guard's dual status. Finally, the third and recommended option is to keep the dual status of the Guard, but to revise the law to allow the DOD to federalize the Guard more easily.

HISTORICAL BACKGROUND

The philosophical roots of the modern National Guard are found in the European militia tradition. The traditional militia was based on the concept that all able-bodied males were obliged to join together to protect their community from danger. The

advantage of a militia was that it was much cheaper than training and maintaining a standing army. Militia members who were not professional soldiers devoted most of their time to other occupations.

English colonists living in frontier American communities did not have the luxury of standing armies and used the militia system for security. Colonial militias were generally adequate to meet the threat posed by hostile Native American tribes, but the militias were much less effective when joined together for participation in prolonged engagements such as the French and Indian War (1756-63).⁹ The militias lacked the formal military training and discipline of professional soldiers. Militia members also suffered from prolonged campaigns because they were taken away from the farms and businesses that were their livelihoods.

The militia made significant contributions during the War for Independence.¹⁰ After the war, leaders of the new nation debated the wisdom of continuing the militia system or maintaining a standing army. Many influential Americans associated the presence of professional soldiers with the English monarchy. Standing armies were seen as a means of enforcing tyranny and a threat to democratic rule.¹¹ The concept of using militias—armed citizens with democratic values—to defend the nation had much appeal.¹² On the other hand, many former soldiers, George Washington included, knew the Revolution would not have succeeded if it had relied solely on the Colonial militias.¹³ Washington did recognize the value of keeping a federalized militia, and in his “Sentiments on a Military Establishment” submitted to the Congress in 1783, Washington recommended a force structure that included a small standing army and a trained, federally-controlled militia in reserve.¹⁴

The Constitution adopted at the 1787 convention and later ratified by the states contained the framework to implement Washington's sentiments. Article I, § 8, Clause 12 provided for a standing army. "[The Congress shall have the power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Article I, § 8, Clause 15 ("First Militia Clause") gave Congress the power to federalize the militia. "[The Congress shall have the power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article I, § 8, Clause 16 of the Constitution ("Second Militia Clause") gave Congress the authority to organize, arm and discipline the militia. "[The Congress shall have the power] To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Article II, § 2, Clause 1 made the President Commander in Chief of the Army and the militia if federalized. "The President shall be commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"

Congress did not fully exercise the authority granted by the Constitution when it passed the first statutes governing military matters.¹⁵ A small standing army was established, but the Militia Act of 1792 left Washington's reserve force completely to the discretion of the states. The new law ignored Washington's plea for a smaller trained reserve force in favor of the traditional militia concept.¹⁶ Congress made all males from ages 18 to 45 part of the militia, and only gave the federal government access to the force

in times of insurrection or invasion. There were no provisions for federal funding, training or oversight, and each militia member was responsible for providing his own arms and equipment.

The weakness of United States' military policy was apparent in the War of 1812.¹⁷ Despite federalizing over 527,000 militia members during the course of the war, a force of 5,000 British soldiers was able to invade the country and burn the capital.¹⁸ The militia's performance during the war was inconsistent. Although Andrew Jackson achieved some notable victories,¹⁹ the New York militia, citing the provision in the law limiting the militia to insurrections and invasions, refused to cross the border and fight the British in Canada.²⁰ The governors of Massachusetts and Connecticut simply refused to implement the President's order to federalize the militia.²¹

The militia was not available in the Mexican War because the military mission fell outside the militia's insurrection and invasion mandate.²² The country did, however, rely on the states to recruit volunteers to augment the regular army.²³ The volunteers did not serve under regular Army officers and were generally led by political appointees.²⁴ The ad hoc force created by the volunteer system was not the trained reserve envisioned by Washington in 1783.

The militia was federalized by President Lincoln at the beginning of the Civil War. The militia did not, however, play an important part in the outcome of the war because the law limited the use of the militia to a period of three months.²⁵ President Lincoln was forced to use the volunteer system and later had to implement the draft. The volunteer system did have attributes common to the militia system. States were tasked with recruiting troops and commissioning officers, but these soldiers were inducted into

the federal army, not into the state militia.²⁶ The actual militia mainly served as a home guard.²⁷

After the Civil War states began to abandon the concept of relying on a militia composed of all able-bodied males.²⁸ States formed units made up of select trained men. The new organizations were called National Guards.²⁹ There were still no federal standards or funding, and Guard units did not train with the regular Army. The Army did, however, take notice of the rise of the National Guard during the 1870's and began discussing using uniform training standards to make the National Guard a viable reserve force.³⁰ In the 1880's Guard members also began lobbying for federal funding and for a role as reserve force.³¹

The impetus for change in the militia laws came in the Spanish American War. Guard units served in Cuba and the Philippines, but only through a statute permitting militia members to voluntarily abandon their militia status and join the federal army.³² Involuntary activation was out of the question since this war again failed to meet the statutory prerequisite of insurrection or invasion.³³

The mobilization process for the Spanish American War was conducted by the states. National Guard units were activated by state governors, assembled and asked to volunteer for federal service.³⁴ The states were also tasked with calling for volunteers from the population at large using Civil War methods. The process was orderly in some states, but in others it became a political free for all with ambitious office seekers lobbying governors for choice commissions.³⁵

Following the Spanish American War, Congress initiated a series of military reforms under the guidance of Secretary of War Elihu Root.³⁶ The Dick Act, passed in

1903, retained the militia composed of all able-bodied males, but divided the militia into a Reserve Militia and an Organized Militia.³⁷ The Organized Militia was composed of federally-funded state organizations that could be activated for up to nine months to quell insurrections, repel invasions, and enforce federal law.³⁸ The Organized Militia was required to structure itself along regular Army lines.³⁹ To receive federal funds and equipment, the Organized Militia was required to train at fixed intervals.⁴⁰ Drills and annual training were mandatory, and the Organized Militia was required to follow regular Army-imposed standards.⁴¹

In 1908, Congress took additional steps to move away from the volunteer system. With encouragement from members of the National Guard, Congress passed legislation requiring the Organized Militia to be activated before a call went out for volunteers.⁴² The 1908 Act also removed the nine-month limitation on militia service and allowed the Organized Militia to be used outside the United States.⁴³

The ability to use the Organized Militia outside the United States was not completely resolved by the 1908 statute. In 1912 the U.S. Attorney General, concurring with the Judge Advocate General of the Army, issued an opinion stating that it was unconstitutional for the Organized Militia to operate outside of the country.⁴⁴ The Attorney General's opinion encouraged discussions regarding the efficacy of abandoning the militia and installing an Army reserve force in its place.⁴⁵

The National Defense Act of 1916 reorganized the military, federalized the Organized Militia (now called the National Guard), and created the Reserves.⁴⁶ The Act restricted the ability of states to maintain troops other than the National Guard, and required Guard members to attend more drills than the 1903 legislation specified.⁴⁷ The

National Defense Act, however, provided federal funds to pay members to attend drills.⁴⁸ The Act also gave the Army authority to set minimum qualifications for officers and to federally recognize or reject officers appointed by governors.⁴⁹ National Guard members were now required to take two oaths on joining, one to the state and one to the federal government.⁵⁰

The National Guard was federalized in World War I and sent overseas. Arguments that the militia could not constitutionally serve overseas were rejected by the courts. Looking to the war powers (rather than militia clauses) given to Congress by the Constitution, the courts found drafting individuals into federal service, regardless of National Guard affiliation, to be constitutional.⁵¹

The National Guard experience in World War I was not all positive. National Guard members were mobilized as individual draftees or volunteers. National Guard members were discharged from state service when they volunteered or were drafted, and after the war most did not choose to renew their affiliation with the Guard.⁵² Moreover, since the Guard was mobilized as individuals, Guard units were broken up and members were reassigned.⁵³ Legislation was enacted in 1920 to correct the deficiencies in the law. The 1920 Act stated that Guard members were not discharged from their state militia obligations after returning from federal service.⁵⁴ The issue of drafting Guard members as individuals was not, however, resolved until the next round of reforms.

Major legal changes in the National Guard were enacted in early 1933 during the first hundred days of Franklin Roosevelt's presidency. In 1933 the National Guard of the United States was created and designated a reserve component of the Army.⁵⁵ From that point, Guard members truly had dual status—Guard members were part of their state

militias and members of a reserve component. Instead of being drafted as individuals, Guard units could now be ordered into federal service by virtue of their status in the Army as a reserve component.⁵⁶

Congress declared a national emergency on August 27, 1940, and the National Guard was activated.⁵⁷ With sufficient time to prepare and train, the Guard performed well during the war. Regular Army critics, however, still complained that many Guard officers were old or incompetent and had to be removed before the units could be used in combat.⁵⁸ After the war, Secretary Forrestal commissioned a study to make recommendations about the future of the Guard. In 1947 the Gray Board recommended eliminating the militia status of the Guard, making it part of the Reserves.⁵⁹ The National Guard's lobbying arm, the National Guard Association, lobbied Congress and the matter was dropped.⁶⁰

Guard and Reserve units were activated for the Korean War. The Guard units were not sent into the theatre for the first year of their activation, and the Reserve units arrived unprepared.⁶¹ After the war Congress reorganized the reserve components by creating the categories of Ready Reserve, Standby Reserve and Retired Reserve.⁶² In 1952 Congress also gave the President authority to activate the Guard for 15 days each year without declaration of a national emergency.⁶³

Guard and Reserve forces were activated during the 1961 Berlin Crisis. It was apparent that both organizations were suffering from lack of training and equipment.⁶⁴ Secretary McNamara studied the problem and determined that it would be more efficient to merge the Reserves into the Guard.⁶⁵ The Reserve Officer Association, by now a powerful lobby, intervened, and the idea died in Congress.⁶⁶

The National Guard and Reserves' mission at the outbreak of the Vietnam conflict was to augment regular forces in the event of war. Statutes in effect until 1976 restricted involuntary activation of the reserves to a Congressional declaration of war or a Presidential declaration of national emergency. President Johnson did not ask for a declaration of war and was not willing to take the political risk associated with declaring a national emergency at the outbreak of the Vietnam War. Reserve and Guard units were not, therefore, activated and sent to Vietnam. As a consequence of being left out of the war, the National Guard and Reserves were considered only marginally useful by the regular component and were generally neglected when it came to funding and training.⁶⁷

Reformation of the National Guard and Reserves began out of necessity under Secretary of Defense Melvin Laird in 1971. The draft was ending and defense budgets were shrinking. Revitalizing the Guard and Reserves and combining the reserve and active components into a "Total Force" appeared to be the most cost effective means of achieving national security goals.⁶⁸ The Total Force concept was formalized by Secretary of Defense James R. Schlesinger on August 23, 1973. Secretary Schlesinger stated that the Total Force was no longer a concept—it was DOD policy.⁶⁹

Implementing the Total Force Policy was not easy. As long as the draft was a threat, large numbers of young men were willing to volunteer for the Guard and Reserves—particularly during the Vietnam War. The last involuntary induction occurred in June 1973, and from 1973 until 1980 Guard and Reserve manpower decreased.⁷⁰ The Total Force was also hampered by the statutes governing activation of the Guard and Reserves. The law still required a declaration of war or national emergency before the reserve component could be called up.

In 1976 Congress amended the law to allow the President to involuntarily activate up to 50,000 National Guard and/or Reserve members for up to 90 days without a declaration of war or national emergency.⁷¹ The Guard and Reserves were also given new equipment and additional training opportunities. Despite positive changes in the law, the purchase of new equipment and implementation of new training initiatives, the Total Force was still not functional in 1981 when Ronald Reagan assumed the Presidency.⁷²

During the Reagan administration, the goal of developing a Total Force moved closer to reality. Secretary of Defense Caspar Weinberger initiated the ‘first to fight, first to equip’ policy on June 21, 1982.⁷³ Units that were expected to fight first would be equipped first, regardless of component.⁷⁴ Secretary Weinberger was also able to significantly increase defense budgets. With additional funding, the Guard and Reserves purchased new equipment and facilities. Additional money was also spent to finance new enlistment and reenlistment incentives for Guard and Reserve members.⁷⁵ Between 1981 and 1989 the Guard and Reserves increased thirty-five percent.⁷⁶ With respect to the Air Force Reserve and the Air National Guard, the integration process with regular forces was successful.⁷⁷

The Total Force was called upon when President Bush exercised his authority under 10 USC § 673(b) and involuntarily activated up to 200,000 National Guard and Reserve members on August 22, 1990, for service in the Persian Gulf.⁷⁸ In January 1991 an emergency was declared and additional National Guard and Reserve members were called to duty. In the end, over 265,000 members of the Guard and Reserves served in the Gulf War.⁷⁹

Following the Gulf War and the collapse of the Soviet Union, it became apparent that large military cuts were possible. The National Guard and Reserves, being cheaper to operate, received many active component missions.⁸⁰ At the same time, Gulf War success and the absence of a Soviet threat made political leaders more willing to look to military solutions for problems overseas. Military units were frequently deployed and the Guard and Reserves, now a necessary part of any operation, were called upon to help.⁸¹

CONSTITUTIONAL STATUS OF THE NATIONAL GUARD

The seminal case relating to the status of the National Guard under the U.S. Constitution is Perpich v. Department of Defense.⁸² The Perpich case reviews the history of National Guard legislation and concludes that the Guard is a state organization operating pursuant to the Second Militia Clause of the Constitution unless federalized. Perpich also establishes that the Guard can be federalized as a militia under the First Militia Clause or it can be federalized as a reserve component under statutes enacted by Congress.

Perpich arose when the Governor of Minnesota argued that the Militia Clauses of the Constitution gave him the right to veto the use of Minnesota troops in Central America.⁸³ In 1952, when Congress originally authorized the President to federalize the National Guard for duty 15 days each year, Congress had also enacted a provision conditioning the activation on gubernatorial consent.⁸⁴ The gubernatorial veto provision was not used until 1985 when the Governors of California and Maine refused to let National Guard troops participate in exercises in Honduras.⁸⁵ Congress reacted to the California and Maine Governors' veto in 1986 by passing the "Montgomery Amendment."⁸⁶ The Montgomery Amendment stated that gubernatorial consent to

National Guard activation could not be withheld “because of any objections to the location, purpose, type, or schedule of such active duty.”⁸⁷

Governor Perpich challenged the Montgomery Amendment in federal court. Citing language in the Militia Clauses, the Governor argued that the National Guard could not be activated without his consent except in the case of a national emergency.⁸⁸ The Supreme Court reviewed the history of the Militia Clauses and the statutes governing the National Guard. The Court determined that the Montgomery Amendment was a valid exercise of Congress’ plenary authority over national defense.

The Court’s opinion is premised on the dual status of the National Guard. Before Congress made the National Guard a reserve component of the United States, the Guard could only be activated pursuant to the First Militia Clause.⁸⁹ The First Militia Clause permitted activation to “execute the Laws of the Union, suppress Insurrections and Repel Invasions.” When activated under the First Militia Clause, the Guard retained its state militia status.⁹⁰

Twentieth Century reforms made the National Guard both a state militia and a reserve component of the United States. Because of its dual status, the National Guard can be activated pursuant to the First Militia Clause, or it can be activated as a reserve component.⁹¹ The ability to activate the Guard as a reserve component is not found in First Militia Clause, but in statutes enacted pursuant to constitutional provisions giving Congress the authority “‘to provide for the common Defense,’ to ‘raise and support Armies,’ to ‘make Rules for the Government and Regulation of the land and naval Forces,’ or to enact such law as ‘shall be necessary and proper’ for executing those powers.”⁹² When the National Guard is activated as a reserve component, prior

affiliation with a state does not provide its members with any special duties or privileges. Militia status ends for the duration of the federal active duty period.⁹³

Federalizing the Guard under the statute permitting for 15 days activation each year is accomplished through Congress' power to regulate the reserve component.⁹⁴ Activation under this provision does not implicate the First Militia Clause. The Congress has plenary authority over the national defense, and the Constitution does not require gubernatorial consent when the Guard is activated as a reserve component. The decision to require gubernatorial consent for activation in the 1952 statute was not required by the Militia Clauses of the Constitution.⁹⁵ The Militia Clauses give Congress *additional* powers over the Guard and should not be viewed as restrictions. "The congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers."⁹⁶ Since there is no constitutional requirement that state governors must consent to federalization of the Guard, the Montgomery Amendment restricting veto that Congress decided to attach to the law is constitutional.⁹⁷

The Perpich opinion does not mean that the National Guard should be treated as a federal organization. The Guard belongs to state governments with federal oversight under the Second Militia Clause until/unless it is federalized. "In a sense, all of them [Guard members] now must keep three hats in their closets—a civilian hat, a state militia hat and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the 'drilling and other exercises ...' are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress,' but when that hat is replaced by the federal hat, the second Militia Clause is no longer

applicable.”⁹⁸ Guard members are, therefore, state employees that can be activated as a reserve component according to the rules prescribed by Congress.

STATUTES GOVERNING THE NATIONAL GUARD

The National Guard is part of the militia, and pursuant to the power given to Congress by the Second Militia Clause, the Guard is governed by Title 32 of the United States Code when it is not in federal service. Title 32 defines “the militia of the United States” as “all able-bodied males at least 17 years of age and, ... under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.”⁹⁹ The militia is divided into two classes, “organized” and “unorganized.” The organized militia includes the National Guard and Naval Militia, and the unorganized militia is made up of every other male between 17 and 45.¹⁰⁰ Pursuant to the powers of the First Militia Clause, Congress has given the President authority to call up the militia to put down insurrections or enforce federal authority.¹⁰¹

Consistent with the Second Militia Clause, Title 32 allows states to recruit and appoint officers and enlisted personnel in the National Guard, but the appointments must follow Air Force and Army standards (the “federal recognition” process).¹⁰² States have the discretion to decide the location of Guard units, but organization and composition of those units is determined by the Air Force or the Army.¹⁰³ The Secretaries of the Air Force and the Army also set National Guard training standards, determine equipment needs, and inspect Guard units to determine compliance with Air Force and Army requirements.¹⁰⁴ The states are responsible for conducting the training of National Guard units according to Air Force and Army standards.¹⁰⁵ If a state National Guard fails to

comply with federal regulations and requirements, the President may bar it from receiving additional funding.¹⁰⁶

The National Guard is governed in its reserve component status under Title 10 of the United States Code. The active component and the Reserves also fall under Title 10. Title 10 defines the Guard as the “the organized militia of the several States and Territories...,” that is “trained and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution,” that is “organized, armed, and equipped wholly or partially at federal expense,” and “is federally recognized.”¹⁰⁷ National Guard members “are not in active Federal service except when ordered thereto under law.”¹⁰⁸ National Guard members who are ordered into active federal service, serve in the Air or Army National Guard of the United States.¹⁰⁹ National Guard members in federal service are relieved of all state National Guard duties under Title 32.¹¹⁰

The Guard (and Reserves) can be activated as a reserve component under Title 10 if war or national emergency is declared by Congress for the duration of the war or emergency plus six months.¹¹¹ Congress has also given the President the authority to activate 200,000 Guard and Reserve members as necessary to augment the regular forces for operational missions.¹¹² Additionally, the Guard may be activated “for not more than 15 days a year” at the discretion of the service Secretary concerned.¹¹³ National Guard and Reserve members that are attached to units must be activated with their units, but individual members may be reassigned after they are federalized.¹¹⁴ Guard members can also volunteer individually for federal service, but must obtain their governor’s consent to leave the state militia.¹¹⁵

IMPACT OF THE GUARD'S DUAL STATUS ON THE TOTAL FORCE

The National Guard is criticized for abuses that are usually attributed to a lack of direct federal oversight. Unlike the Reserves who fall under the formal DOD command structure, state governors are the Commanders in Chief of the National Guard. Unlike the Reserves, Guard members are not subject to the UCMJ. Promotions, although subject to federal oversight, are still primarily a matter of state discretion, and Guard officers are frequently promoted to the general officer ranks without ever having to compete for a promotion on a national level.¹¹⁶

In a series of articles published in *USA Today* on 17-19 December 2001,¹¹⁷ the Guard was criticized for inflating troop-strength numbers that are tied to federal funding.¹¹⁸ The Guard was also criticized for allowing civil rights abuses and for failing to discipline or eliminate criminals within the officer corps:

Americans have taken comfort since the Sept. 11 terrorist attacks as National Guard units in nearly every state have been called out to protect airports, power plants and other critical parts of the nation's infrastructure. Yet, at a time when the 460,000-member Guard is playing such a vital role, an investigation by USA TODAY reveals a pattern of misconduct in the Guard's upper echelons that has continued for more than a decade. Much of the misconduct has gone unpunished as governors, state legislatures and members of Congress look the other way and Pentagon investigators are powerless to root out the problems.

The abuses range from inflating troop-strength reports and misusing taxpayer money to sexual harassment and stealing hundreds of thousands of dollars in life-insurance payments, some intended for the widows and children of Guardsmen. Together, they raise questions about the quality of some of the Guard's top leaders and the political spoils system under which many are picked.¹¹⁹

The argument presented by *USA Today* is that state officials consider the Guard to be part of the active military and therefore rarely intervene in its affairs.¹²⁰ The active military, however, has no direct authority over the National Guard until it is federalized, and no effective means to address abuses. Guard officers are, according to *USA Today*, left to their own devices, and in many cases corruption is the result.¹²¹

Writers at *USA Today* are not the Guard's only critics. In a law review article published in 1990,¹²² and again in a 1994 book, Jeffrey A. Jacobs argues that the Guard's state status should be eliminated.¹²³ "The most radical, most politically controversial, and most necessary step in reforming the system is to eliminate state control of the Army National Guard."¹²⁴ Jacobs believes that the concept of a militia as a functional part of the national defense is outdated and contrary to the DOD's Total Force Policy:

Although the Guard's federal mission today bears virtually no resemblance to the role of the colonial militia, the infrastructure within which the Guard must perform that mission is basically the same as that of the militia. Peacetime state control of the National Guard remains. This system is the legacy of a citizen-soldier force designed for a different time, a different place, and a different mission. It is wholly unsuited to the United States Army of the twenty-first century.

The increased funding with which the Guard has been blessed by the Total Force Policy cannot alone buy the Guard's readiness. Notwithstanding the money, peacetime state control of a significant portion of the Army and well over half of its reserve forces impairs the ability of the Army to prepare those forces for combat. State control of the Guard guarantees that training for combat during peacetime will not always be the number one priority, and that when it is, training will not always be accomplished to the standards of the active component, which, in the end, bears the ultimate responsibility for employing the Guard in combat.¹²⁵

Jacobs believes that eliminating the Guard would result in a more effective and efficient command structure and save money.¹²⁶

There is, of course, a positive side of the dual status of the National Guard. The Guard's state status allows it to be used in ways that Title 10 forces cannot. The Guard, as a state organization, is available to governors for disaster relief and to assist law enforcement agencies faced with riots or civil disturbances. The Guard in its militia status is not subject to the Posse Comitatus Act's (18 USC § 1385) prohibition of using the Air Force or the Army for routine law enforcement purposes.¹²⁷ The Guard is also currently used in federally-funded interdiction and counterdrug programs nationwide.¹²⁸ Following the September 11, 2001, terrorist attacks on the United States, federal authorities funded National Guard troops in Title 32 status to provide security at airports throughout the country.

Perhaps the most important contribution of the Guard's dual status to the Total Force is the political power its critics deride. The National Guard presence in all states and territories, and its politically active membership, create a powerful lobby.¹²⁹ When the Guard is activated, the American public is supportive of military operations. Congress also listens to the Guard and provides for its needs. If the Guard is eliminated, the funds currently allocated to Guard programs may not be reassigned to the DOD. Without the Guard, assets that the DOD counts on in a crisis may dwindle and disappear.

The true impact of the dual status of the National Guard on the Total Force can only be determined by comparing Guard performance to that of similarly situated units of the Reserves. National Guard critics so far have not pointed to much hard evidence suggesting that Reserve performance is superior. The failure to comment suggests that

either the issue has not yet been fully studied, or that the Guard and Reserves perform about the same in combat situations. If the Guard performs as well as the Reserves when it is federalized, it becomes much more difficult to justify elimination. Congress may not see the additional costs associated with maintaining the militia system as a valid reason for a radical reorganization of the reserve component.

OPTIONS FOR CHANGE AND SUPPORTING ARGUMENTS

1. Eliminate the National Guard's State Militia Status and Merge the Guard into the Air Force and Army Reserves.

The Perpich opinion shows that Congress' authority in military matters has few limitations under the Constitution.¹³⁰ Although the Second Amendment may create a fundamental right to a state militia, it cannot be fairly interpreted as creating a right to a *federally-funded* state militia. The militia received no funding from the federal government until the twentieth century, and it stands to reason that if Congress chose not to fund the militia in the future, Congress' decision would be consistent with the Constitution. There is, therefore, no constitutional impediment to merging the National Guard into the Air Force and Army Reserves.

Conceptually, eliminating the Guard would streamline the reserve component and reduce administrative costs significantly. Eliminating the National Guard's state status would allow the DOD to have direct control of all active and reserve component forces in peacetime, and the National Guard corruption described the December 2001 *USA Today* articles might be avoided with direct DOD oversight. Promotion of officers could also be standardized, and military discipline throughout the reserve and active component should become more consistent.

Making the Guard part of the Reserves could appear to be a public acknowledgment of the obvious. The National Guard's existence is dependent on federal funding, and federal funding is conditioned on the Guard's role as a reserve component. Providing state governors with a force to call on in times of crisis is certainly an important factor in Congress' continued funding of the Guard, but the state missions of the Guard are secondary to the Guard's contribution towards the national defense. It is hard to argue credibly that Congress agreed to buy advanced jet fighters for the National Guard because they are needed for disaster relief or riot control.

Eliminating the National Guard would not have to be accomplished in one legislative session that eliminated thousands of jobs across the United States. State status could be removed incrementally, with units remaining at their current locations and strengths during a transition period. The National Guard might even function for a time as a separate Title 10 reserve component directed by the National Guard Bureau. Congress could pass legislation that would allow state governors to obtain help from the newly federalized National Guard in emergency situations. A proposal for gradual change is more likely to survive political scrutiny than a drastic reorganization.

2. Retain the Status Quo.

The National Guard could be left in its current dual status. There does not appear to be any real evidence that making the Guard into a Title 10 organization would significantly enhance its war fighting skills. Complaints regarding Guard training levels seem to apply equally to the Reserves. Moreover, eliminating the Guard may eliminate support for DOD programs in Congress. A streamlined reserve component that does not include the Guard could eventually lead to reducing or eliminating the largest military

presence in many states since the DOD might not find it cost effective to maintain all current Guard installations. Without a local military constituency, members of Congress might be more reluctant to invest in the DOD—particularly in the reserve component of the DOD.

The National Guard does have legitimate state missions although federal funding is primarily justified to provide a potential reserve component asset. In addition to the traditional disaster relief and emergency law enforcement functions, Guard members in Title 32 status are used for interdiction and counterdrug missions. Title 32 Guard members have also contributed to War Against Terrorism by providing security at airports. Eliminating the militia status of the National Guard might save money, but it would have negative consequences as well.

Continuing the National Guard in its dual role does not imply acquiescence in the corruption and abuses listed in *USA Today*. The dual status of the Guard does not mean that there is no federal oversight.¹³¹ The Second Militia Clause gives the federal government the authority to train the militia “according to the discipline prescribed by Congress,” and the Guard is required to comply with federal statutes, and DOD regulations. Federal authorities provide most of the funds and all of the equipment for the Guard. The service secretaries have the right and a duty to inspect the National Guard. If Guard units fail to comply with federal directives, they should be held accountable through the budgeting process.

Title 10 and Title 32 units can train together with the active component taking the lead—regardless of formal chains of command. If military units can simulate war, they can simulate unity of command. When unity of command is needed for a military

operation, the Guard can be federalized. Guard units can be activated for 15 days a year for any reason, and the President has the authority to augment the regular forces with up to 200,000 Guard and Reserve members. Routine missions requiring Guard units to participate in a Title 10 status, such as Alert missions for NORAD, are accomplished through the volunteer system. Air Guard volunteers fly Title 10 missions for the active component every day.

The National Guard could be improved—if improvement is necessary—without changing the law or eliminating the Guard’s militia status by asking the active component to take a more vigorous interest in Guard training. Laws currently exist that allow assigning active component officers in National Guard units. As suggested by Jacobs, active component officers could be used in place of some active Guard officers.¹³² The infusion of active component officers could help integrate Guard and active component units when they operate together.

3. Recommended Option: Maintain the Dual Status of the National Guard, but Make Statutory Changes that Benefit the Total Force Policy.

Eliminating the dual status of the National Guard at this juncture does not appear to be warranted. If, however, it is ever determined that the effectiveness of the National Guard has fallen significantly below that of the Reserves, the issue should be revisited. The current dual status does have its drawbacks and could be improved with a few changes to the present law.

Revisions of statutes pertaining to the peacetime National Guard must comply with the Second Militia Clause. In peacetime the National Guard operates under laws enacted pursuant to Second Militia Clause, and Congress’ authority under the Second Militia Clause is limited. Congress has the power to “provide for organizing, arming and

disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” The Second Militia Clause reserves to the states the power of, “Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” The statutes that govern the National Guard establish an organization that is state until it is federalized.¹³³ Unity of command with the active component is not possible until/unless the Guard is ordered into federal service by Congress or the President.

A hybrid Title 10/Title 32 force that maintains its militia status, but is always subject to direct federal control, would violate basic principles of federalism. Dual status means Guard members serve two separate sovereigns, a state government and the federal government. The dual status is constitutionally permissible because Guard members only answer to one sovereign at a time. Guard members “keep three hats in their closets—a civilian hat, a state militia hat and an army hat—*only one of which is worn at any particular time.*”¹³⁴ Changes in the law must be consistent with the Guard’s dual status, and if direct federal control of the peacetime Guard is necessary, the Guard will have to be merged into the Reserves. Rather than eliminate the Guard entirely, the following suggestions should help the Total Force Policy by making it easier for the DOD to federalize it.

First, the provision requiring a governor’s consent to voluntary activation should be repealed.¹³⁵ The consent provision was added to the 1952 law so that governors could maintain a force level sufficient to meet state needs in the event of disaster.¹³⁶ The gubernatorial consent provision is not mandated by the Constitution,¹³⁷ and is an artificial requirement—particularly in cases of air crews who routinely fly federal missions in

volunteer status. Many units are probably ignoring the consent provision already, and it could be eliminated, at least with respect to air crews, without a fight.

The law should be amended to allow Guard units to be activated during drill periods. The Perpich decision shows that Congress' authority to activate the National Guard as a reserve component is very broad. Giving the DOD access to Guard assets during drill periods may prove beneficial when forces are allocated to homeland defense and might also provide some additional access to National Guard air crews currently flying routine Title 10 missions on a voluntary basis.

Full time Guard members (AGR and Technician) should be subject to involuntary activation by service secretaries at any time, with some reasonable time limit such as 90 days. Having full time cadre members on active duty would provide continuity when moving traditional Guard members in and out of federal service.

Jacobs suggests abolishing weekend drills for a system of two 15-day periods of active duty a year.¹³⁸ This system may work well for members of professions that do not follow a traditional work schedules. Airline pilots, in particular, may prefer concentrating their National Guard duties within two lengthier periods. Guard members in other professions may find it difficult to increase time away from work to 30 days, instead of the current 15 days each year. Jacobs' plan could be implemented on a unit-to-unit or on an individual basis. The law should be amended to allow Guard members to serve in two 15-day increments and to be federalized during those periods as needed.

CONCLUSION

The dual status of the National Guard is based on the Militia Clauses of the Constitution. After neglecting the militia for a century, Congress began a series of

reforms in 1903 that led to the current system. The National Guard is federally funded and follows standards set by the active component. Guard members, however, serve as state employees until ordered into active service by federal authorities. Once ordered into federal service, unity of command with the active component is possible, and it has become increasingly easy to activate the Guard to support the active component.

There are disadvantages to maintaining a system that removes the peacetime Guard from direct DOD control. Notable cases of cronyism and corruption have occurred because unethical Guard officers have taken advantage of their dual status. Eliminating the Guard might solve the corruption problem and would permit cost-saving measures. The dual status of the Guard does, however, benefit the nation in some respects. The Guard's Title 32 status provides a federally funded emergency force to the states and provides assistance to law enforcement officials fighting illegal drugs and terrorism. The National Guard's political support also gives the DOD assets it can federalize and use to augment the regular component that it might otherwise not have.¹³⁹ The DOD can usually find Congressional support for purchasing new equipment if the new equipment is divided among state National Guard units.

Until it is established that the Reserves, who are always subject to DOD control, are a substantially better fighting force, the Guard's dual status should be continued. Amending the law to allow the active component greater access to the Guard does, however, make good sense. Guard members should be allowed to volunteer for federal service without the administrative hurdle of their governor's consent. The DOD should be able to activate Guard units serving in their weekend drill status. Weekend drills should be eliminated for some Guard members, and the active component should be

allowed to federalize Guard members serving in the optional two 15-day periods. Finally, full time Guard members should be available for federal service at any time for up to 90 days.

Notes

¹ The purpose of the reserve component is to “provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other time as the national security may require.” 10 USC § 10102. “In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all time.” 32 USC § 102.

² In time of war or national emergency Guard and Reserve units may be activated for the duration of the war or emergency and six months thereafter. 10 USC § 12301(a). The President has the discretion to augment regular forces by activation of up to 200,000 Guard or Reserve unit members for up to 270 days. 10 USC § 12304.

³ 10 USC § 12301 (b) and (d).

⁴ Jeffrey A. Jacobs, *The Future of the Citizen-Soldier Force*, Lexington, KY: The University Press of Kentucky, 1994, 42.

⁵ Ibid.

⁶ Ibid., 45.

⁷ Ibid.

⁸ Stephen M. Duncan, *Citizen Warriors: America's National Guard and Reserve Forces & the Politics of National Security*, Novato, CA: Presidio Press, 1997, 140.

⁹ Jerry Cooper, *The Rise of the National Guard: The Evolution of the American Militia, 1865-1920*, Lincoln NE: University of Nebraska Press, 1997, 3.

¹⁰ Ibid., 7. “For all its failings, however, the militia played a crucial role in the Revolution. First and foremost, patriot militia ensured that rebellious Americans gained control of local and state governments early in the war. The British failed to devise a counterrevolutionary strategy that would have allowed them to restore the Crown’s authority in even one colony. Local patriot control ensured use of the militia system to mobilize troops. The states managed to provide enough soldiers to sustain the Continental army, organize their own forces, and turn out temporary militia units. Patriot control of the state militia systems gave the Americans the only institutional means available for mobilization.”

¹¹ Ibid., 5. “The retention of ten thousand British troops in North America following the defeat of the French in 1763 and Parliament’s decision to regulate and tax the colonies, of course, precipitated the political conflict leading to the American Revolution. In identifying the British army as the symbol of imperial oppression, colonial agitators appropriated the anti-standing-army rhetoric of seventeenth-century English Radical Whig thinkers. American opponents of Crown policy found radical ideas appealing because they emphasized that only citizen soldiers, that is, the militia, were fit to defend a republic. Whig ideology maintained that an aroused citizenry organized in an effective militia could save republicanism by restoring constitutional balance, protecting property rights, and preserving civil liberty. Virtuous citizen soldiers would rise in righteous anger to remove the king’s armed mercenaries and reassert republican rule.” The Second Amendment to the Constitution represents American Radical Whig thinking. The Second Amendment states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

¹² Ibid.

¹³ Fredrick B. Wiener, “The Militia Clause of the Constitution,” *Harvard Law Review*, Vol LIV, No. 2, 181-220, December 1940, 182-83. In 1776 Washington warned Congress not to depend on the militia. “If I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.” Quoting Letter, Washington to the President of Congress, September 24, 1776, in 6 *The Writings of George Washington* (1932) 106, 112.

¹⁴ Cooper, 7-8. Wiener, 183.

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¹⁵ Wiener, 186-87. Cooper, 9.

¹⁶ Wiener, 183. “[Washington] contemplated a body, consisting only of the younger members of the community, who should be properly officered, and periodically trained under uniform supervision. It is fair to say that no such body of militia existed during the whole of the Nineteenth Century. And, as it happened, the substance of Washington’s *Sentiments* was rejected by the First Congress, the paper itself was forgotten and ‘militia’ came to mean undisciplined and badly-regulated forces. Belief in citizen-soldiers became inextricably intertwined with an undying faith in the martial prowess of untrained men led by political generals.”

¹⁷ Cooper, 10. “The militia’s woeful performance during the War of 1812 is the best illustration not only of the failure of the Militia Act of 1792 but of the demise of the regular militia in American military affairs.”

¹⁸ Wiener., 188.

¹⁹ James B. Whisker, *The Rise and Decline of the American Militia System*, Cranbury, NJ: Associated University Presses, Inc., 1999, 392. “The militia lack interest both in the concept of manifest destiny that argued that Canada must be added to the Union and in the rather vague causes of the War of 1812, but they became heartened after the British made the catastrophic mistake of burning their new national capital. Also when adequately, especially inspirationally, led, the militia performed wonders, as under Andrew Jackson at the Battle of New Orleans. After seasoning in battle, the raw recruits who had appeared as an undisciplined mob grew into a viable fighting force.”

²⁰ Wiener 188-89.

²¹ Ibid.

²² Ibid., 190.

²³ Ibid. Cooper, 18.

²⁴ Wiener, 190.

²⁵ Ibid., 190-91.

²⁶ Cooper, 19-21. Wiener, 191.

²⁷ Wiener, 191.

²⁸ Ibid.

²⁹ Cooper, 23-43.

³⁰ Ibid., 87-96.

³¹ Ibid., 108-109.

³² Wiener 192-93.

³³ Ibid.

³⁴ Cooper, 101-102.

³⁵ Ibid. 102-103.

³⁶ Cooper, 108-127. Wiener, 193.

³⁷ Cooper, 109.

³⁸ Ibid.

³⁹ Wiener, 195-96.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid., 197.

⁴³ Ibid., 197-98. Cooper, 109.

⁴⁴ Wiener, 198.

⁴⁵ Cooper, 117-127. Wiener, 199. Secretary of War, Lindley M. Garrison published a “Statement of a Proper Military Policy” in early 1916. The “Statement” called for limiting the militia to invasions, insurrections and supporting the federal law. The Organized militia would be replaced by a federal reserve force called the “Continental Army.” When President Wilson refused to endorse the plan, Secretary Garrison resigned.

⁴⁶ Cooper, 153-56. Wiener, 199-201.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

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- ⁵⁰ Ibid.
- ⁵¹ Wiener, 203-204.
- ⁵² Cooper, 173, Wiener, 205-06.
- ⁵³ Wiener, 204-05.
- ⁵⁴ Ibid. 206.
- ⁵⁵ Ibid. 208.
- ⁵⁶ Ibid.
- ⁵⁷ Jacobs, 40-41.
- ⁵⁸ Ibid.
- ⁵⁹ Ibid. 42.
- ⁶⁰ Ibid.
- ⁶¹ Ibid. 42-43.
- ⁶² Ibid. 43.
- ⁶³ Ibid.
- ⁶⁴ Ibid. 44-45.
- ⁶⁵ Ibid., 45.
- ⁶⁶ Ibid.
- ⁶⁷ Ibid., 45-46.
- ⁶⁸ Duncan, 140.
- ⁶⁹ Ibid., 141.
- ⁷⁰ Ibid., 141-42.
- ⁷¹ 10 USC § 673B. Kevin D. Hartzell, "Note: Voluntary Warriors: Reserve Force Mobilization in the United States and Canada," *Cornell International Law Journal*, Vol. 29, 537-570 (1996), 547-549. Congress increased the number of Guard and Reserves that could be called up from 50,000 to 100,000 in 1980. In 1986 Congress amended the law to allow 200,000 troops to be activated under Section 673B. In 1994 Congress extended the period of involuntary service from 90 to 270 days. 10 USC § 673B was renumbered 10 USC § 12304(a) in 1994.
- ⁷² Duncan, 142-46.
- ⁷³ Ibid., 146,
- ⁷⁴ Ibid.
- ⁷⁵ Ibid., 147-49.
- ⁷⁶ Ibid., 150-51.
- ⁷⁷ Ibid., 151.
- ⁷⁸ Colin L. Powell, with Joseph E. Persico, *My American Journey*, New York: Random House, 1995, 472. Chairman of the Joint Chiefs of Staff, Colin Powell stated that the reserve was activated because, "we could not have gone to war without them."
- ⁷⁹ Honorable Charles A. Cragin, Principal Deputy Assistant Secretary of Defense for Reserve Affairs, "Milestones on the Road to Integration," pp. 1-8. Available on the Internet at <http://www.defenselink.mil/ra/documents/articles/ROA00finaal.htm>.
- ⁸⁰ Duncan, 196-99. Mr. Duncan attests to the influence of the political power of the Guard and Reserves on the force structure adopted by Congress at the close of the Cold War.
- ⁸¹ Ibid. National Guard and Reserve members were involuntarily activated by President Clinton for operations in Bosnia, Kosovo and Southwest Asia. National Guard and Reserve members are currently participating in the War Against Terrorism.
- ⁸² 496 U.S. 394 (1990).
- ⁸³ Ibid., 336-339.
- ⁸⁴ Ibid., 346.
- ⁸⁵ Ibid.
- ⁸⁶ Ibid.
- ⁸⁷ Ibid., 337.
- ⁸⁸ Ibid. 347.
- ⁸⁹ Ibid., 348-49.
- ⁹⁰ Ibid., 348-50.

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⁹¹ Ibid.

⁹² Ibid., 349.

⁹³ Ibid., 347-48.

⁹⁴ Ibid., 350-51. Congress has the power to provide for the common defense, raise and support armies, make rules for the government and regulation of the land and naval forces, and to enact such law as shall be necessary and proper for executing those powers.

⁹⁵ Ibid., 353-55.

⁹⁶ Ibid., 350.

⁹⁷ Ibid., 354-55.

⁹⁸ Ibid., 348.

⁹⁹ 32 USC § 311(a).

¹⁰⁰ 32 USC § 311(b). States are prohibited from maintaining troops other than the National Guard and a state defense force. 32 USC § 109.

¹⁰¹ 32 USC §§ 331-335.

¹⁰² 32 USC §§ 301-13.

¹⁰³ 32 USC § 104(a)-(c). Title 32 gives the President authority to assign “the National Guard to divisions, wings, and other tactical units.” 32 USC § 104(d). Guard units may not be disbanded and their strength may not be reduced without the President’s consent. 32 USC 104(f).

¹⁰⁴ 32 USC §§ 105 and 501-507.

¹⁰⁵ 32 USC § 501.

¹⁰⁶ 32 USC § 108. States are prohibited from maintaining troops other than the National Guard and a state defense force.

¹⁰⁷ 10 USC § 101(c)(1)-(4); 32 USC § 101.

¹⁰⁸ 10 USC § 12401.

¹⁰⁹ The Air and Army National Guard of the United States are “reserve component[s] of the [Air Force and Army] all of whose members are members of the [Air and Army] National Guard.” 10 USC § 101(c)(3) and (5); 10 USC § 10101. National Guard units in federal service are components of the Air Force or Army and units not in federal service are in National Guard status. 10 USC §§ 10106-107 and 10112-113. Guard members that are ordered into federal service serve as Reserves of the Army or Air Force. 10 USC § 12403.

¹¹⁰ 32 USC § 325(a). “Each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.”

¹¹¹ 10 USC § 12301(a). Guard members that are activated will serve “inside or outside the territory of the United States” as ordered for the term of their federal service. 10 USC § 12407.

¹¹² 10 USC § 12304(a)-(c).

¹¹³ 10 USC § 12301(b).

¹¹⁴ 10 USC § 12301(c).

¹¹⁵ 10 USC § 12301 (d).

¹¹⁶ David Moniz and Jim Drinkard, “Misconduct Marks Guard Command,” *USA Today*, 17 December 2001, p. 1. “Guard senior officers rise through a system that, unlike the active military, allows some with little formal education to get top jobs. Dozens of senior Guard officers—lieutenant colonels, colonels and generals—have been promoted with no college degrees or with degrees that required little academic work. In one case described in an Army investigation, a Guard general obtained a correspondence degree by completing few requirements. He got 119 of 134 college credits for his military and life experience.”

¹¹⁷ The articles were written by David Moniz and Jim Drinkard and ran in *USA Today* from December 17-19, 2001.

¹¹⁸ Ibid., note 116. “Guard officials in many states have repeatedly inflated Army Guard troop-strength reports to hide a shortage of soldiers. Within individual National Guard units, as many as 10% to 20% of the troops are “ghost soldiers” who exist only on paper, government investigators and Guard

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officers say. The practice raises questions about the Guard's ability to field fully ready units in this time of crisis."

¹¹⁹ Ibid.

¹²⁰ Ibid. "Because almost all of the money for Guard units comes from the federal government, governors and state legislatures tend to largely ignore their operation."

¹²¹ Ibid. "A lack of federal oversight creates a climate in which commanders believe they can violate regulations without fear of punishment."

¹²² Jeffrey A. Jacobs, "Note: Reform of the National Guard: A Proposal to Strengthen National Defense," *Georgetown Law Journal*, Vol. 78, 625-647 (February 1990).

¹²³ University of Kentucky Press, internet.

<http://www.uky.edu/UniversityPress/books/futucits.html>: "Jeffrey A. Jacobs is an attorney in civilian life and a civil affairs officer in the Army Reserve, in which he holds the rank of major."

¹²⁴ Jacobs, *ibid.* note 4, p. 108.

¹²⁵ Ibid., 109.

¹²⁶ Ibid., 109-11.

¹²⁷ Lt Col Steven B. Rich, "The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service," *Army Lawyer*, June, 1994, 35-43, 42-43. Kurt Andrew Schlichter, "Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations," *Loyola of Los Angeles Law Review*, Vol. 26, 1291-1333 (Summer, 1993), 1299: "The Posse Comitatus Act does not apply to all military forces, however. The Coast Guard is not included under the Act, nor is the National Guard when it is under state control. While the various state National Guard forces are trained and regulated according to federal standards, they remain under the command of the state governor who may freely use them in law enforcement operations until federalized by the President as authorized by statute."

¹²⁸ 32 USC § 109. Joint Chiefs of Staff, "Joint Counterdrug Operations," Joint Pub 3-07.4, Chapter III, Section C(42)(a) (17 February 1998): "The [National Guard] provides military support for local-, state-, and Federally-sponsored [Counterdrug] efforts. Its role in [counterdrug] operations is another portion of its traditional state mission of providing military support to civilian authorities. These activities are funded under title 32 of the USC rather than title 10, which is Federally controlled."

¹²⁹ Lt Col Daniel L Gladman, *Total Force Policy and the Fighter Force*, Maxwell AFB, Alabama: Air University Press (1995), 41: "Congressional requests to support Guard and Reserve units are given serious consideration within the Department of Defense, since ignoring the request may result in the request's becoming directive in subsequent congressional language." "The National Guard caucus has generally been successful in protecting the Air National Guard from cuts, since the organization provides a clear majority in the Senate and a kind of collective security for the 62 senators belonging to the caucus—an attack on one senator's Guard unit or program is viewed as an attack on all!"

¹³⁰ Jeff Bovarnick, "Comment: *Perpich v. United States Department of Defense: Who's in Charge of the National Guard?*" *New England Law Review*, Vol. 26, pp. 453-494 (Winter 1991); David J. Scheffer, "Decision: *Perpich v. Department of Defense*, 110 S.Ct. 2418," *The American Journal of International Law*, Vol. 84, pp. 914-921 (October 1990). Mr. Bovarnick, a member of the Army National Guard, raises an interesting question in his article. What would have been the impact on the Guard if the Supreme Court had held that the Montgomery Amendment was unconstitutional? Governors who disagreed with the Gulf War may have vetoed the use of their Guard troops. Would congress have eliminated the Guard if this had happened? Mr. Scheffer, a Senior Associate, Carnegie Endowment for International Peace, argues that *Perpich* decision is flawed because it intrudes into states' militia rights. He suggests that the Montgomery Amendment is a Cold War relic and should be repealed by Congress.

¹³¹ Patrick Todd Mullins, "Note: The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug of War," *George Washington Law Review*, Vol. 57, pp. 328-62 (December 1988), 343: Mr. Mullins argues there is too much federal interference with the Guard. "The current system is characterized by federal control over almost all facets of the Guards. There is almost no area of operation in which the Guards are not constrained by federal control."

¹³² Jacobs, 123.

¹³³ 10 USC § 12401.

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¹³⁴ Perpich, 348.

¹³⁵ 10 USC § 12301(d): "At any time, and authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with consent of the member. ***However, a member of the Army National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriated authority of the State concerned.***"

¹³⁶ Perpich, 351-53.

¹³⁷ Ibid., 353-55.

¹³⁸ Jacobs, 126-27.

¹³⁹ Gladman, 41: "The total capability of the Air Force has, however, occasionally benefited from the strong collective support enjoyed by the reserve components in Congress. Cuts in active programs, for structure, or equipment have often been restored by transferring the items to one of the reserve components."

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